

**OPINION
52-99**

February 1, 1952 (OPINION)

LABOR UNIONS

RE: Bargaining Agents, Failure of Employer to Appoint

We have your letter of January 31, 1952, in which you request an opinion on the following:

Section 34 0909 of the compiled laws of North Dakota provides 'That in the event any employee or employees shall desire to appoint a bargaining agent or strike against an employer, prior written notice thereof shall be given to the employer and it shall be the duty of the employer within two (2) days thereafter to designate a representative of the employer to act in the conduct of an impartial and secret ballot or election to determine such bargaining agent, or whether a strike shall be had.'

In an instant case in point a labor union has complied with all other regulations required by previous sections of this law and has notified the employer by registered letter (January 12, 1952) that the union desired to appoint a bargaining agent or strike and has requested employer to select a representative to act in accordance with the law. The employer to date has ignored the written notice although he had personally and through his attorney tacitly recognized the existence of a union in his establishment by discussing wages and terms of employment with the chosen representatives of this union.

Having ignored the mandate of section 34-0909 by refusing to acknowledge the duty imposed on him to select a representative of the employer as a part of the employer's legal obligation to establish collective bargaining, the union is deprived of certain privileges granted them by this law as follows:

1. The union cannot be considered a legal bargaining agent until the employer has selected a representative in compliance with the law.
2. The union cannot legally call a strike until the employer has cooperated in setting up an election committee.
3. The union cannot advertise that the employer is unfair to union labor until the employer has complied with the law by selecting a representative to hold an election."

In view of the above facts you ask what remedy under the law a union has when the employer refuses to comply with section 34-0909 of the 1949 Supplement to the Revised Code of 1943.

It is the opinion of this office that the appropriate remedy would be

by alternative writ of mandamus. Section 32-3401 of the 1943 Revised Code which provides by and to whom a writ of mandamus may be issued reads as follows:

The writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is precluded unlawfully by such inferior tribunal, corporation, board, or person."

It would appear that the duty owing by the employer arose from an office, trust or station and that there is no other plain, speedy or adequate remedy in the ordinary course of law. The employer, by section 34-0909 of the 1949 Supplement to the 1943 Revised Code, has a duty imposed by law to designate a representative to act for the employer. It is a duty which is purely ministerial. It is not a permissive duty, but a duty which is specific, clearly defined and preemptory in its nature and of such a character that the court can prescribe a definite act which will constitute a performance of that duty so that the respondent employer may know what he is obliged to do and may do the act required and the court may know that the act has been performed and may enforce its performance.

In view of what I have stated above, it would then appear that the union would proceed by an order to show cause why a writ of mandamus should not lie in accordance with chapter 32-34 of the 1943 Revised Code.

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Attorney General